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No. 08-1325

In The
Supreme Court of the United States

DEREK BARR, et al.,

Petitioners,

v.

STEVE LAFON, Individually and in His Official Capacity as Principal of William Blount High School, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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RESTATED QUESTIONS PRESENTED

I. Whether a content-based restriction on student speech that satisfies the *Tinker* standard of a reasonable forecast that the restricted speech will substantially and materially disrupt schoolwork and school discipline is narrowly tailored to the state and the school's substantial interest in educating students.

II. Whether the "offensiveness" of a symbol that has been associated with racial prejudice, coupled with a racially hostile school environment, can contribute to the analysis of whether the presence of the symbol will substantially and materially disrupt schoolwork and school discipline or collide with the rights of other students.

III. Whether restriction on student speech can be justified via a "heckler's veto," an issue that was not raised, preserved or decided below.

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JURISDICTION

The mootness doctrine may deprive the Court of jurisdiction. See discussion of mootness doctrine below.

STATEMENT OF THE CASE

I. Procedural Background

On March 2, 2006, the Petitioners filed this civil rights action under 42 U.S.C. § 1983 in the United States District Court, Eastern District of Tennessee at Knoxville, alleging that their First Amendment Freedom of Speech right and their Fourteenth Amendment Equal Protection and Due Process rights were violated when the Respondent school officials banned the wearing or display of the Confederate flag during school hours. The Petitioners concomitantly filed a motion for preliminary injunction and temporary restraining order. On March 13, 2006, Respondents filed a response in opposition to the motion for preliminary injunction and temporary restraining order.

On May 4, 2006, a motion hearing was held and argument was heard on the motion for preliminary injunction and temporary restraining order. On June 6, 2006, the District Court entered its "Memorandum and Opinion" and its "Order" denying the motion for preliminary injunction and temporary restraining order. The Petitioners timely appealed the denial of injunctive relief. Oral argument was heard. On February 21, 2007, a panel of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed the District Court's denial of the Petitioners'

motion for preliminary injunction. *D.B. ex rel. Brogdon v. Lafon,* 207 F. App. 518 (6th Cir. 2007) (unpublished) (per curiam).

On February 10, 2007, the Petitioners filed a motion for summary judgment. On April 5, 2007, the Respondents filed a motion for summary judgment. On May 24, 2007, in an oral ruling, the District Court denied the Petitioners' motion for summary judgment and granted the Respondents' motion for summary judgment. On May 31, 2007, the District Court entered its judgment and dismissed the action with prejudice.

The Petitioners appealed the denial of their motion for summary judgment and the grant of the Respondents' motion for summary judgment. On April 22, 2008, oral argument was heard. On August 20, 2008, the Sixth Circuit panel issued its opinion affirming the District Court's decision. *Barr, et al., v. Lafon, et al.,* 538 F.3d 554 (6th Cir. 2008), *reh'g denied* by *Barr v. Lafon*, 553 F.3d 463 (6th Cir. 2009).

II. Relevant Facts

During the 2004-2005 school year, William Blount High School (WBHS), with a student population of approximately 1,750 students of which less than ten percent (10%) were African-American, Pet. App. 5a, experienced physical altercations between Caucasian students and African-American students and multiple racially motivated threats against African-American students. App. 3b. On April 7, 2005, due to threats of violence against African-American students and at the request of Alvin Hord (Hord), Superintendent of Blount County Schools, WBHS was "locked down" by

deputies from the Blount County Sheriff's Office in attendance. *Id.*

Bathroom graffiti at WBHS contained a threat to kill African-Americans on a specific date and was linked to the KKK. Pet. App. 8a. Other graffiti found on a bathroom stall stated "niggers 'hang em'" **accompanied by drawings of a noose and a Confederate flag**. *Id.* **"The south will rise again!!!** and when we do look out cause will (sic) rule the world!!! GIT-R-DONE SON!" was directly above this graffiti. *Id.*

After consideration of all these incidents and other facts, Hord determined that the wearing or displaying of racially divisive symbols, including the Confederate flag, by students during school hours was disruptive to the educational process at WBHS. App. 4b. The disruptive effect was evidenced by high absenteeism resulting from the fears of the parents and students. *Id.*

During an assembly at the beginning of the 2005-2006 school year, students were informed that due to the racial hostility, wearing or displaying of racially divisive symbols, including specifically the Confederate flag, would be a violation of the dress code policy. Pet. App. 4a. Even so, Appellants D.B. and C.W. violated the policy by wearing clothing bearing the image of the Confederate flag. Pet. App. 12a.

The Petitioners admit to a prior history of racially related violence and threats of violence at WBHS. Pet. App. 25. Even though the Petitioners allege that the ban is viewpoint specific, the Petitioners admit that racially divisive symbols other than the Confederate

flag are dealt with by the Respondents in the same manner as the Confederate flag. Pet. App. 44a, 45a.

REASONS FOR DENYING THE PETITION

The decisions below do not implicate a federal question that has not been decided by this Court nor do they conflict with a decision of this Court or any Court of Appeals. Additionally, as recently as 2003, this Court declined to review an analogous case applying the legal precedent to similar facts. Accordingly, the Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition for Writ of Certiorari to be granted. *See* Sup. Ct. R. 10.

I. The Court Does Not Have Authority to Review the Present Case.

A. The Case or Controversy Limitation of Article III of the United States Constitution Renders this Case Moot.

Article III of the United States Constitution denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)(quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *id.* When there ceases to be a controversy between the litigating parties due to events occurring after the trial court has rendered judgment, the decision of an appellate court

would be a mere academic exercise, and the court may not decide the appeal.

The Petitioners were minors when their complaint was filed, but now are all majority age. Pet. App. ii; App. 7b, 10b, 13b, 15b. None of the Petitioners attend WBHS or any other school operated by the Respondents. App. 17b.

The "capable of repetition yet evading review" exception to mootness, does not apply here. "This extremely narrow exception to the mootness doctrine is applicable only where: 1) the challenged action is too short in duration to be fully litigated before the case will become moot; and 2) there is a reasonable expectation that the complaining party will be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam).

Even if the Petitioners could satisfy the first prong of the exception, the youngest of the Petitioners would now be nineteen and unlikely to return to the Respondents' school system. App. 13b. The Petitioners filed the complaint for themselves only, not also on behalf of any other similarly situated students. Pet. ii. The Respondent school officials no longer have the power or opportunity to adversely affect any Petitioners' constitutional rights. Consequently, the Petitioners are subject to no ongoing harm or controversy for the Court to remedy.

[M]ootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-396 (U.S. 1980) (quoting *Powell v. McCormack*, 395

U.S. 486, 496 (1969)). One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

In their complaint, the Petitioners prayed for damages, according to proof, declaratory judgment and injunctive relief. App. 19b, 20b. No proof of damages is available in the record. No declaratory judgment or injunctive relief is available to Petitioners because they are no longer in an adversarial position to the Respondents, and the Petitioners sought no nominal damages. *Id.* Accordingly, this case is moot and therefore non-justiciable.

B. The Issue of a "Heckler's Veto Was Not Raised, Preserved or Decided Below, and No Evidence of a "Heckler's Veto" Exists in the Present Case.

In First Amendment law, a "heckler's veto" is the suppression of speech by the government because of the possibility of a **violent reaction** by hecklers. *See*, *Bachellar v. Maryland*, 397 U.S. 564, 567 (U.S. 1970) (emphasis added).

The Petitioners seek review by the Court of an issue they never raised until their Petition for a Writ of Certiorari. App. 22b-36b. In fact, the Petitioners seize onto the term from Chief Judge Boggs' dissents from the denials of rehearing en banc. Pet. App. 70a, 116a, 118a. The dicta in his dissents about the

problems he perceives with *Tinker* does not address any proof offered by the Petitioners or any reasoning used by the school officials in determining to ban racially divisive symbols that they reasonably forecast would substantially and materially disrupt schoolwork and school discipline or impinge on the rights of other students.

The record is devoid of any evidence of a "heckler's veto". Increased absenteeism caused by the fear and apprehension inherent in an insidious racially charged atmosphere cannot equate to a "heckler's veto." App. 4b.

The courts below did not decide any issue involving a "heckler's veto." Accordingly, the Court has no basis for review, and the petition should be denied.

II. The Sixth Circuit's Decision Does Not Involve an Unsettled Question of Federal Law or Conflict with Supreme Court Precedent.

The Petitioners proffer questions regarding strict scrutiny as applied using the *Tinker* standard, particularly regarding the school's educational mission as a significant governmental interest and the forecast of disruption as narrowly tailoring the restriction on student speech. The Court has addressed and settled those questions in previous opinions. The decision below properly applies those precedents to the facts of this case without violation or abrogation of those precedents.

A. The School's Need to Maintain the Discipline and Learning Environment Necessary to Accomplish Its Educational Mission as a Substantial Governmental Interest.

The Petitioners misstate the substantial government interest that the Sixth Circuit decision addressed. The Sixth Circuit did not designate the school's broad educational mission as the substantial governmental interest. Instead, the Sixth Circuit evaluated the restricted speech under the same interest that was present in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the maintenance of the discipline and learning environment necessary to accomplish the school's educational mission.

"Plaintiffs-Appellants' claims lead us to wrestle with a most difficult question: how to balance some students' rights to free speech with 'the rights of other students to be secure and to be let alone,' taking into account the authority of school officials to maintain the discipline and learning environment necessary to accomplish the school's educational mission." *Barr v. Lafon*, 538 F.3d 554, 562 (6th Cir. Tenn. 2008) (quoting *Tinker*, 393 U.S. at 508.) "Therefore, our inquiry in this case is whether the ban on clothing depicting the Confederate flag 'is necessary to avoid material and substantial interference with schoolwork or discipline.'" *Id.* at 564 (quoting *Tinker*, 393 U.S. at 511).

The Sixth Circuit held that the substantial governmental interest in this case as in *Tinker* was to

"avoid material and substantial interference with schoolwork or discipline", and "to maintain the discipline and learning environment necessary to accomplish the school's [broader] educational mission." *Id.* at 562, 564.

The Sixth Circuit evaluated the Court's holdings in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), cases presenting exceptions to the stringent *Tinker* standard, and determined that *Tinker* was the applicable standard in the instant case. *Id.* at 563-64.

The Sixth Circuit decision evaluated *Morse v. Fredrick*, 127 S. Ct. 2618 (2008), and referenced that "Justice Alito also makes clear that he joins the majority only insofar as 'the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions' beyond those articulated in *Tinker, Fraser*, and *Hazelwood*." *Id.* at 564 (quoting *Morse*, 127 S. Ct. at 2637). Therefore, the Sixth Circuit's well-reasoned analysis negates the Petitioners contention that "[b]y establishing that the school's 'mission to educate its students' is the significant government interest, . . . epitomizes the danger predicted by Justices Alito and Kennedys' [sic] concurring opinion in *Morse*". Pet. 6.

Therefore, the Sixth Circuit decision does not involve an unsettled question of federal law or conflict with Supreme Court precedent. Accordingly, review by the Court is unfounded, and the petition should be denied.

B. The Reasonable Forecast of Disruption Announced in *Tinker* is the Narrowly Tailored Restriction on Student Speech.

The Petitioners misunderstand the Court's student speech jurisprudence. The Petitioners ask the Court to require more than announced in *Tinker* and even aver that the Fifth Circuit and Ninth Circuit established a new "intermediate" standard regarding student speech.

In the Fifth Circuit case, *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), parents of students argued that the dress code established by the school board, requiring mandatory uniforms, violated their children's right to free speech under the First and Fourteenth Amendments. *Id.* at 439. Because the dress code was content neutral, the *Canady* court held that the traditional "time, place and manner" test should applied. *Id.* at 443.

Neither the Fifth Circuit nor the Ninth Circuit case, *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008), establish a new standard regarding school speech, but merely decline to impose the more stringent *Tinker* burden on the school officials because the restricted speech did not address a content-based restriction that can only be justified under the "material and substantial interference with schoolwork or discipline".

The Ninth Circuit, in evaluating the school uniform issue held:

> Although Tinker did not equate its "substantial interference" test with the "strict scrutiny test" that is now commonly used in First Amendment cases (perhaps because that terminology was not in common parlance at the time, see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (earliest Supreme Court case using this terminology in the free speech context)), Plaintiffs' argument rests on the "substantial interference" test being more difficult to withstand than the intermediate scrutiny test.

Id. at 429.

The Court's holding in *Tinker*, clearly demonstrated that "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. (U.S. 1969). The Court held that "the prohibition of expression of one particular opinion, at least without evidence that it is **necessary to avoid material and substantial interference with schoolwork or discipline**, is not constitutionally permissible." *Id.* at 511 (emphasis added to highlight the narrowly tailored requirement to meet the governmental interest).

The Sixth Circuit did not eliminate the narrowly tailored requirement by finding, "Our inquiry, then, is whether the school reasonably forecast that the Confederate flag would cause material and substantial disruption to schoolwork and school discipline." *Barr*,

538 F.3d at 565. Accordingly, review by the Court is unfounded, and the petition should be denied.

III. The Sixth Circuit Court of Appeals' Decision Does Not Create a Conflict among the Federal Circuits.

The opinions below conform with precedent of this Court and other circuits that have addressed the issue applying *Tinker* and its progeny. In *Tinker,* the Court addressed the issue of content-based restriction on student speech in the context of public schools, and the federal circuits uniformly apply the standard in cases with similar facts or distinguish cases with different facts; however, no palpable conflict exists.

A. The Federal Circuits Uniformly Apply the *Tinker* Standard.

In *Morse*, the Court's most recent student speech case, Justice Roberts outlined the *Tinker, Fraser, Hazelwood* framework, and in his concurrence, Justice Alito reiterated that school speech cases are decided by applying the precedents articulated in *Tinker, Fraser*, and *Hazelwood*.

Student speech pursuant to the First Amendment presents courts with very complex issues, so most all courts deciding such issues begin with this trilogy of cases to determine into which its analysis belongs. The courts that have applied *Tinker* have done so uniformly.

The Sixth Circuit applied *Tinker* in the present case by distinguishing the facts in each case to reach a different conclusion without violation to the

standard. In its analysis, the Sixth Circuit looked to a case in the Tenth Circuit that presented similar facts. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365-67 (10th Cir. 2000) (denying an injunction sought by the parents of a student who was suspended for drawing a confederate flag in school). The Second Circuit summarized the holdings of the original three Supreme Court decisions and held for all other speech, meaning speech that is neither vulgar, lewd, indecent, or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate student speech unless it would materially and substantially disrupt classwork and discipline in the school. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) (citations omitted).

In *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992), for example, a middle school punished students who wore "SCAB" buttons to protest replacement teachers during a strike. Applying *Tinker* because the school had failed to present any evidence that the buttons were "inherently disruptive" to school activities, the court held that students could proceed with their First Amendment claim. The Eighth Circuit views *Tinker* as allowing school officials to "restrict even individual student expression that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or that would substantially interfere with the work of the school or impinge upon the rights of other students." *Henerey es rel. Henerey v. City of St. Charles*, 200 F3d. 1128, 1132 (8th Cir. 1999).

Butts v. Dallas Independent School Dist., 436 F.2d 728, 729-730 (5th Cir. 1971) referred to companion

cases in its court: *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); and *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) applying *Tinker* to two differing sets of facts with two different outcomes based upon the facts. Both involved prohibition against wearing SNCC buttons, by the school authorities. In *Burnside* there was no disruption and the authorities were enjoined. In *Blackwell* there was disruption, and the complaint was dismissed. The duty of the courts in future cases of the same kind therefore seems clear enough, and the trial judge properly proceeded to examine in detail the alleged disruptions and threats of disruption that were considered by the Dallas School Officials on and just before October 15, 1969.

The circuits all interpret the holding in *Tinker* uniformly and apply it to the facts of their cases to determine the outcome, which may be analogous to or distinguishable from *Tinker*. Likewise, the Sixth Circuit distinguished the facts in the present case from the facts in *Tinker* and cases from the Eleventh, Third and Fifth Circuits, Pet. App. 32a-33a; but the panel properly applied *Tinker*. Accordingly, review by the Court is unfounded, and the petition should be denied.

B. This Court Declined to Review This Issue in a Similar Case From the Eleventh Circuit.

As recently as 2003, this Court declined to review an Eleventh Circuit decision in which the grant of the school board's motion for summary judgment was

affirmed based upon the application of the standards in both *Tinker* and *Fraser*[1] concluding that

> [S]chool officials can appropriately censure students' speech under either of the following two theories. First, from the *Tinker* case, school officials are on their most solid footing when they reasonably fear that certain speech is likely to "appreciably disrupt the appropriate discipline in the school." *Denno v. School Bd. Of Volusia County* , 218 F.3d 1267, 1271, (citing *Tinker*, 393 U.S. at 514). Second, from *Fraser*, even if disruption is not immediately likely, school officials are charged with the duty to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government." To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in a reasonable fear of immediate disruption. *Denno*, 218 F.3d at 1271. As the Supreme Court stated in *Fraser*:
>
> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate

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[1] The Sixth Circuit explicitly rejected the *Fraser* analysis regarding offensiveness in the present case. App. 32a (A footnote in the decision explaining and distinguishing holdings from other circuits).

> highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U.S. at 508, 89 S. Ct. at 737.... The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. Fla. 2003), *cert. denied by Scott v. Sch. Bd.*, 540 U.S. 824 (2003).

The *Scott* Court found "the ban on the display of Confederate symbols was not unconstitutional" because "[s]chool officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the action underlying this case." *Id.* at 1249. The facts presented in *Scott* are similar to those in the present case; yet, the evidence in *Scott* appears much more scant and based upon not only the reasonable forecast of disruption but also upon "hurt feelings, emotional trauma and outright violence which the display of the symbols involved . . . could provoke." *Id.*

No significant legal developments have taken place since this Court denied the Petition for a Writ of Certiorari in *Scott*. Accordingly, review by the Court is unfounded, and the petition should be denied.

IV. The Sixth Circuit Court of Appeals' Decision Was Correct and Accurate; the Right Result Was Reached.

The decisions below properly applied the relevant legal precedents in this case without creating conflict with any decision of this Court or the federal circuits.

A. The Sixth Circuit Properly Analyzed the Evidence and Did Not Create Any Irrebuttable Presumptions.

1. The Sixth Circuit's analysis regarding "offensiveness" of the symbol did not create any presumption.

As most courts do, the Sixth Circuit began its analysis by discussing the precedents within the *Tinker, Fraser, Hazelwood* framework. In the discussion of the trilogy, the court noted that this Court's recent *Morse* decision cautioned against broad application of the "plainly offensive" standard in *Fraser*, which should be limited so as not to encompass "political and religious speech [that] might be perceived as offensive to some." Pet. App. 19a. As noted supra in footnote 1, the court explicitly refused to apply such standard in the present case because "we disagree that a display of the Confederate flag constitutes vulgar or 'plainly offensive' speech under *Fraser*. Pet. App. 32a.

Additionally, the court cautioned that its decision "does not establish a precedent justifying a school's ban on student speech merely because other students find that speech offensive . . . '. The court

conscientiously avoided any validation of the ban in the present case simply because other students may be offended by the banned symbol's presence. Consequently, the court did not create any presumption, much less an irrebuttable presumption as the Petitioners aver.

Accordingly, review by the Court is unfounded, and the petition should be denied.

2. The Sixth Circuit's analysis of the "disruptive potential" of the symbol did not create any presumption.

The Petitioners aver that the Sixth Circuit created several presumptions as to the "disruptive potential" of the Confederate flag. *See* Pet. 25. However, the Sixth Circuit did not create any presumptions; it merely drew inferences from the evidence. In fact, the "Petitioners are not challenging here the District Court's conclusions regarding these presumptions, or the Circuit Court's refusal to find error regarding those conclusions." *Id.*

If as the Petitioners state, the conclusions drawn from the presumptions do not merit challenge, then the effect of any so-called presumptions is valid. In truth, the Petitioners are asking the Court to do what the district court and two Sixth Circuit panels have done— review the facts in evidence for error. *Id.*

Pursuant to Supreme Court Rule 10, that is not the function of this Court's review and does not demonstrate "compelling reasons" for the petition to be

granted. Accordingly, review by the Court is unfounded, and the petition should be denied.

B. The Sixth Circuit Properly Analyzed the Evidence Regarding *Tinker*'s Collision with the Rights of Other Students to Be Secure and Let Alone.

The Petitioners aver that the Sixth Circuit ignored and reached beyond the evidence presented to create a "new right: the right to not be (sic) offended. Pet. 26. However, as discussed in Section IV. A. 1. *supra*, the court conscientiously avoided any validation of the ban based on the symbol's perceived offensiveness.

Again, the Petitioners are asking the Court to review the facts presented in the case as reviewed by two Sixth Circuit panels, which both denied rehearing, and rehearing en banc was denied twice. Accordingly, review by the Court is unfounded, and the petition should be denied.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 3:06-CV-75

[Dated April 3, 2007]

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., minors, by and through their parent and guardian, ROGER WHITE,

Plaintiffs,

vs.

STEVE LAFON, in his individual and official capacity as Principal of William Blount High School; ALVIN HORD in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Defendants.

AFFIDAVIT OF ALVIN L. HORD

STATE OF TENNESSEE
COUNTY OF BLOUNT

Alvin L. Hord, being first duly sworn makes oath in due form of law as follows:

1. That I am Alvin L. Hord, the duly appointed Director of Schools of the Blount County School System, that the information contained in this Affidavit is based upon my own personal knowledge and the records of the Blount County School Board, that I am the custodian of those records, and that I am competent to testify as to these matters.

2. The policy of the Blount County middle schools and high schools, including William Blount High School, relative to dress codes is attached hereto and incorporated by reference as Exhibit 1. This policy was in effect and was enforced by the Blount County School Board at all times material to this litigation. The policy is enforced evenly and in a non-viewpoint specific manner during the school hours. This policy was adopted upon the recommendation of the Tennessee School Board Association.

3. The Blount County School System has two (2) high schools – William Blount High School and Heritage High School. Racially motivated incidents, including violence and/or threats of violence, have occurred in these schools leading up to calendar year 2005-2006 and include the following:

(a) On February 22, 2005, there was a physical altercation between a white student and an African-American student. The altercation resulted in a racial harassment complaint filed against the Blount County School Board with the United States Department of Education, Office of Civil Rights by the

family of the African-American student, which matter is now closed.

(b) From February 22, 2005, through the remainder of the school year, multiple racially motivated threats and physical altercations among students at both Blount County high schools occurred and resulted in disciplinary actions to the appropriate students, including suspension of the students from the Blount County schools. Resulting from some of these altercations were two (2) additional complaints filed by parents of African-American students to the Office of Civil Rights charging racial discrimination and harassment in the Blount County schools. These latest filed complaints are presently stayed in the Office of Civil Rights due to the pending civil action in this Court styled *John Cleveland, el al v. Blount County School District 00050, et al*, Civil Action No. 3:05-CV-380. *Cleveland* alleges that William Blount High School is a racially hostile educational environment. *(Cleveland* Complaint ¶ 12.) A copy of the *Cleveland* Complaint and Amended More Definite Statement are attached hereto as Exhibit 2.

(c) During the school year of 2005-2006, there have been two (2) additional complaints to the Blount County School Board alleging racial harassment.

4. Due to the racial tension and threats of violence against African-American students that existed at William Blount High School on April 7, 2005, the school was "locked down" at my request by deputies from the Blount County Sheriff's Office, and the presence of deputy sheriffs at William Blount High School continued until the end of the school year.

5. When making the decision to ban racially divisive symbols, including the Confederate flag, I relied upon numerous conversations with students and parents of students which revealed that students were taunted by the Confederate flag and were fearful for their safety as a result of the racial tensions at William Blount High School. The parents' and the students' fears were evidenced by a dramatic increase in absenteeism during the time of racial tension prior to the lockdown and the ban.

6. After much consideration of the parents' and students' concerns regarding the aforementioned incidents, consultation with community leaders and diversity training, I determined that the wearing of clothing depicting racially divisive symbols, including the Confederate flag, by students during school hours had a significant disruptive effect on the proper educational environment of the students at William Blount High School.

7. The decision to ban the wearing of clothing depicting the Confederate flag and other racially divisive symbols was based partly upon the information provided by the Blount County Sheriff's Office and specifically recited in the affidavits of Deputy Joe Crisp, Deputy Andy Waters and Detective David Henderson.

8. In banning racially divisive symbols, I specifically included the Confederate Flag because it had been disruptive; however, the Principal of William Blount High School was instructed to ban any racially divisive symbols or flags that caused disruption or was likely to cause disruption.

9. I directed the principal at William Blount High School to enforce the dress code without viewpoint discrimination as to all racially divisive symbols.

10. There is approximately 1,750 students at William Blount High School and less than ten percent (10%) are African-American.

Affiant further saith not.

/s/
Alvin L. Hord

SWORN TO AND SUBSCRIBED before me this 3 day of April, 2007.

/s/ Nancy E. Allman
Notary Public
[SEAL]

My commission Expires:
10/04/10

APPENDIX B

IN THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 306-CV-75

[Dated January 12, 2007]

D.B., A minor by and through his parent and guardian, Sharon Brogdon, R.W. and C.W., minors, by and through their parents and guardian, Roger White,

Plaintiffs,

VS.

STEVE LAFON, in his individual and official capacity of William Blount High School, and ALVIN HORD, in his official capacity as Director of Schools, and BLOUNT COUNTY SCHOOL BOARD,

Defendants.

APPEARANCES:
VAN IRION,
Attorney for the Plaintiffs

ROBERT N. GODDARD,
LAJUANA G. ATKINS,

Attorneys for the Defendants,
Blount County School Board
and Steve LaFon and Alvin Hord
in their official capacities

GARY M. PRINCE,
Attorney for the Defendant,
Steve LaFon in his individual capacity

DEPOSITION OF DEREK MATHIAS BARR

JANUARY 12, 2007

* * *

[p.5]

Q. Are you a student at William Blount High school?

A. Not no more.

Q. Did you graduate?

A. No, I dropped out.

Q. Have you received your GED or you just dropped out of school?

A. No, I was in the middle -- I had started my classes at Everett but, of course, I had a kid, so most of my time has been spent at work.

Q. Okay.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 306-CV-75

[Dated January 12, 2007]

D.B., A minor by and through his parent and guardian, Sharon Brogdon, R.W. and C.W., minors, by and through their parents and guardian, Roger White,

Plaintiffs,

VS.

STEVE LAFON, in his individual and official capacity of William Blount High School, and ALVIN HORD, in his official capacity as Director of Schools, and BLOUNT COUNTY SCHOOL BOARD,

Defendants.

APPEARANCES:
VAN IRION,
Attorney for the Plaintiffs

ROBERT N. GODDARD,

LaJUANA G. ATKINS,
Attorneys for the Defendant,
Blount County School Board
and Steve LaFon and Alvin Hord
in their official capacities

GARY M. PRINCE,
Attorney for the Defendant,
Steve LaFon in his individual capacity

DEPOSITION OF CHRIS NICOLE WHITE

JANUARY 12, 2007

* * *

[p.3]

CHRIS NICOLE WHITE,

having been first duly sworn, was examined and deposed as follows:

EXAMINATION

BY MR. GODDARD:

Q. Would you give your full name, please, ma'am?

A. Chris Nicole White.

Q. Ms. White, I am Rob Goddard. Again, you heard me explain who I am and what I am. If you have any questions about or don't understand any of the questions that I'm asking, please stop me, and we'll start over or do whatever we need to do because I want

to make sure you understand what I'm asking you to give your answer; is that all right?

A. (Witness nods head affirmatively).

Q. And you'll need to -- instead of nodding your head, you'll need to give your answers verbally.

A. Okay.

Q. You have been here while the testimony of Derek Barr has been given. Have you heard that?

A. Yes.

Q. Is there anything that he testified to that you disagree with?

A. No.

Q. Where are you presently in school?

[p.4]

A. I'm a junior in the process of getting home schooled.

Q. You're a junior at William Blount High School?

A. Uh-huh (Affirmative).

Q. And you're in the process of getting home schooled; is that right?

A. Yeah.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Civil Action No. 306-CV-75

[Dated January 12, 2007]

D.B., A minor by and through his parent and guardian, Sharon Brogdon, R.W. and C.W., minors, by and through their parents and guardian, Roger White,

Plaintiffs,

VS.

STEVE LAFON, in his individual and official capacity of William Blount High School, and ALVIN HORD, in his official capacity as Director of Schools, and BLOUNT COUNTY SCHOOL BOARD,

Defendants.

APPEARANCES:

VAN IRION,
Attorney for the Plaintiffs

ROBERT N. GODDARD,
LaJUANA G. ATKINS,
Attorneys for the Defendant,
Blount County School Board
and Steve LaFon and Alvin Hord
in their official capacities

GARY M. PRINCE,
Attorney for the Defendant,
Steve LaFon in his individual capacity

DEPOSITION OF ROGER CRAIG WHITE

JANUARY 12, 2007

* * *

[p.3]

ROGER CRAIG WHITE,
having been first duly sworn, was
examined and deposed as follows:

EXAMINATION

BY MR. GODDARD:

Q. Would you give your name for the record, please, sir?

A. Roger Craig White.

Q. Mr. White, my name is Rob Goddard, and I think you've heard me say to the others that if I ask a question that doesn't make any sense to you, you stop

me and I'll start over and -- whatever we need to do; is that agreeable?

A. Yes, sir.

Q. How old are you?

A. Seventeen.

Q. Are you presently in school?

A. Yeah.

Q. Where are you presently a student?

A. William Blount High School.

Q. Have you been at William Blount during your entire high school career?

A. Yeah.

Q. You heard the testimony that was given by

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

CIVIL ACTION NO: 3:06-CV-75

[Dated May 4, 2007]

D.B., a minor by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian, ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; and ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Defendants.

[p.1]

[PROPOSED] PRE-TRIAL ORDER

The Parties, pursuant to the Court's Scheduling Order, respectfully submit this Proposed Pretrial Order.

(A) JURISDICTION

Jurisdiction is founded upon 28 U.S.C. §§ 1331 and 1343 and is not in dispute.

(B) PLEADINGS

The pleadings are amended to conform to this Pretrial Order and this Pretrial Order supplants the pleadings.

* * *

[p.9]

10. On March 3, 2006, plaintiffs filed the subject lawsuit in the United states District Court of Tennessee under 42 U.S.C. § 1983, Civil Action 3:06-cv-75, alleging violations of their First Amendment and Fourteenth Amendment rights to free speech, equal protection, and due process.

11. The minor Plaintiffs are not now students of William Blount High School or any other school operated by the Defendants, however, at least one is a home-schooled student but is still eligible to enroll at William Blount High School.

12. Defendant Blount County School Board has adopted a dress code which prohibits, under Section 4f, "clothing which exhibits written,

pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation."

13. At the request of Defendant Alvin Hord, Superintendent of Blount County Schools, on April 7, 2005, William Blount High School was "locked down" with deputies from the Blount County Sheriff's Office in attendance.

14. Approximately 1750 students attend William Blount High School and less than 10% of that amount are African-Americans.

* * *

[p.11]

s/van R. Irion
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2327 Laurel Lake Road
Knoxville, Tennessee 37932
(865) 809-1505
Attorney for Plaintiffs

s/Robert N. Goddard
Robert N. Goddard (BPR #006789)
Attorney for Steve Lafon, in his official capacity,

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

CIVIL ACTION NO: 3:06-CV-75
Jordan/Shirley

[Filed March 2, 2006]

D.B.*, a minor by and through his parent and guardian, SHARON BROGDON, R.W.* and C.W.*, minors, by and through their parent and guardian, ROGER WHITE,	)
Plaintiffs,	)
v.	)
STEVE LAFON, in his individual and official capacity as Principal of William Blount High School; and ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,	)
Defendants.	)

* A reference list containing full names of minor plaintiffs has been filed under seal with the Court pursuant to local rule 7.3.

[p.1]

COMPLAINT

Introduction

This is a Complaint seeking remedies for violation of the Plaintiffs' First Amendment rights. Defendants, contrary to law and pursuant to facially unconstitutional policies, disciplined Plaintiffs based on the content of their expressive behavior when Plaintiffs attempted to express their pride in their southern heritage by wearing various clothing bearing images of the Confederate (rebel) flag. Plaintiffs seek damages, declaratory judgment and temporary and permanent injunctive relief to redress Defendants' violation of their rights under the First and Fourteenth Amendments of the United States Constitution.

* * *

[p.7]

THIRD CAUSE OF ACTION

(14th Amendment Due Process)

23. The actions of the Defendants, as set forth in paragraphs 1-18 above, which are fully incorporated herein, entitle the Plaintiffs to a remedy under 42 U.S.C. § 1983 because the Defendants have, under color of state law, violated Plaintiffs clearly established rights to due process guaranteed under the Fourteenth Amendment to the United States Constitution

as applied to the states and their political subdivisions, in that Defendants' policies are vague, overbroad, and lack sufficient standards and safeguards to curtail the discretion of school officials, thereby allowing Defendants unbridled discretion to enforce said policies in an ad hoc and discriminatory manner.

24. As a direct result of Defendant's actions, Plaintiffs have suffered direct and immediate violations of their constitutional rights and are therefore entitled to injunctive and declaratory relief, damages and reasonable attorneys' fees, pursuant to Federal Rules of Civil Procedure 57 and 65 and 28 U.S.C. § 2201; to redress and remedy the violations, and to prevent irreparable harm and future violations of their rights and the rights of others.

Prayer and Relief

WHEREFORE, Plaintiffs respectfully ask for judgment in their favor and against Defendants, including temporary and permanent injunctive relief; a declaration that the actions of Defendants, as described herein, were and are unconstitutional, illegal, and

[p.8]

void, and that the same were in contravention of Plaintiffs' constitutional rights; damages according to proof; and expungement of any references to any disciplinary action in the Plaintiffs' records relating to their wearing items bearing the flag, or otherwise displaying confederate symbols. Plaintiffs further asks

for judgment that Defendants reimburse Plaintiffs for their reasonable attorneys' fees, expenses, and costs associated with the maintenance of this action, pursuant to 42 U.S.C. § 1988, and all such further relief as the Court may deem just and proper.

Respectfully submitted,

/s/
Van R. Irion BPR# 024519
2327 Laurel Lake Road
Knoxville, TN 37932
(865) 670-1105 telephone & facsimile
Attorney for Plaintiffs

Dated: March 2, 2006

Of Counsel

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APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO: 07-5743

[Filed November 28, 2007]

DEREK BARR; CRAIG WHITE and CHRIS WHITE both minors, by and through their parent and guardian, ROGER WHITE,	)
Plaintiffs / Appellants,	)
v.	)
STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,	)
Defendants / Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

FINAL BRIEF OF THE APPELLANTS'
Oral Argument Requested

Van R. Irion
LAW OFFICES OF VAN R. IRION
2327 Laurel Lake Road
Knoxville, TN 37932
(865) 809-1505
Counsel for Appellants

See Next Page for Opposing Counsel

[p.2]

V. ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in granting defendants' motion for summary judgment

B. Whether the District Court erred in denying plaintiffs' motion for summary judgment based upon violation of equal protection

C. Whether the District Court erred by refusing to apply relevant legal standards

D. Whether the District Court erred by failing to grant plaintiffs all reasonable inferences from evidence presented prior to granting defendants motion for summary judgment

E. Whether the District Court erred by considering inadmissible evidence

* * *

[p.15]

Therefore, if the legal standards asserted by the plaintiffs are applicable to the case at bar, then plaintiff's motion for summary judgment should be granted and defendants' motion must be denied, *regardless* of any justification under *Tinker*.

1. The District Court's Rejection of the Supreme Court's *Mosley* Doctrine[1]

Justification of the defendants ban under the *Tinker* standard is simply the substantial-government-interest step in an equal protection analysis.

> "Cities certainly have a substantial interest in stopping picketing which disrupts a school. 'The crucial question, however, is whether [Chicago's ordinance] advances that objective in a manner consistent with the command of the Equal Protection Clause.' It does not. "*Mosley*, 408 U.S. at 99, (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

As in *Mosley*, the school's prohibition in the case at bar addresses the same substantial interest, preventing disruption in the school, but as in *Mosley* it does so in a manner that violates Equal Protection.

---

[1] For a more comprehensive review of the *Mosley* case and its applicability to the case at bar, please see Plaintiff-Appellants' Motion for Summary Judgment and Reply. (R. 57, p. 6-9, Supp.JA p.359; and R. 75, p. 3-9, Supp.JA p.438, respectively).

"Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school.

* * *

[p.19]

2. Banning "Racially Divisive Symbols" while Teaching Racial Inclusiveness is Per Se Viewpoint Discrimination

The *Mosley* opinion discussed viewpoint discrimination, but was primarily a case about content discrimination. For proper analysis content discrimination and viewpoint discrimination must be distinguished. While content discrimination within a regulation can sometimes be justified by showing a significant government interest *and* narrow tailoring, **viewpoint discrimination "is never permitted."** *Mosley,* 408 US. 92, 99; see also *R.A.V.*, 505 U.S. 377, 391-94.

Viewpoint discrimination is found when one expression of opinion on a topic is perfectly legal, but the expression of the opposite opinion is illegal. *R.A.V.*, 505 U.S. 377, 391-94. Content discrimination, on the other hand, is the prohibition of any discussion of a given topic itself, whether in support-of or opposed-to the particular subject. *Id.* For example, a regulation banning all discussions about politics is content specific. Whereas a regulation banning expressions of opinion in favor of one political party, but banning

expressions of opinion *against* the same political party, is viewpoint discriminatory.

Content discrimination is more general and inclusive, and therefore, more even-handed. Viewpoint discrimination is more specific and more onerous. This is why equal protection sometimes allows the former, but never allows the latter. *Id.*

The case at bar is an egregious violation that strikes at the very heart of the First Amendment. Regardless of any policy arguments in favor of diversity, regardless of any negative effects of racial intolerance, Americans have the right to express their views on topics such as race. The First Amendment was specifically intended to protect viewpoints that are unpopular. If such topics are likely to cause disruption in the school, then *the topic* may be banned. But proof of disruption does not grant the government the right to prohibit only expressions of the unpopular side of the discussion. If the government is allowed to assert its view on an issue, *and* it is also allowed to silence the opposing view, then we might as well take the First Amendment out of the Constitution.

3. The "Possibility" of Governmental Suppression of Particular Ideas is Enough to Presumptively Invalidate a Regulation

> "The government may not regulate use based on hostility--or favoritism–towards the underlying message expressed." *R.A.V.*, 505 U.S. 377, 386.

> "[The city] has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That *possibility* would *alone* be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevated the possibility to a certainty." *Id* at 394. (emphasis added).

* * *

[p.26]

the issues raised here.[3] The question was not asked in an attempt to prove that defendant Hord would, in fact, continue to have the ban enforced under the hypothetical circumstances. It was intended to establish defendant Hord's motives in enforcing the ban as he currently is. And the question served that purpose very well, as discussed above.

The District Court's failure to recognize the materiality of this question, and the defendants' other statements, illustrates the Court's failure to recognize the Constitutional requirements established by *Mosley*

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[3] While hypothetical questions may not be used to prove the assumptions within the question, and may not be used to confuse the witness, the question presented here was neither confusing, nor asked to prove the underlying assumption. It was asked to clarify motive. Also note that "form-of-the-question" objections must be made at deposition to be preserved. The record shows that such an objection was not made, and is therefore waived.

and *R.A.V.*, related to acceptable *enforcement* of the defendants' ban. Again, the District Court's analysis of this case began and ended with a one-step determination of whether the defendants had produced any evidence that supported their initial justification under *Tinker*.

4. Conclusion on Legal Determinations

The defendant school wants to have its' cake and eat it too. It claims that "racially divisive" symbols are disruptive, and are therefore banned. But the only symbol that is banned all the time, without regard to circumstances, is the

* * *

[p.28]

conclusively eliminated the *possibility* that they are "seeking to handicap the expression of particular ideas."

d. The District Court Failed to Give the Plaintiffs Reasonable inferences[4]

In considering evidence, the Court "must give the non-movant the benefit of every reasonable inference." *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

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[4] This discussion is a summary of evidence presented. For more complete discussions of the evidence please see plaintiffs' opposition to the defendants' motion for summary judgment. (R. 78, Supp.JA p.453).

> "The school bears the burden of demonstrating sufficient facts to support its forecast of substantial disruption." *Lowery v. Euverard*, __ F.3d__, No. 06-6172 (6th Cir. 2007), citing *Tinker*, 393 U.S. 503.

Since the defendants bear the full burden of proof regarding their motion, by granting the defendants' motion for summary judgment the District Court has determined that the defendants' evidence is so overwhelming that it sufficiently forecloses any reasonable possibility that the defendants' forecast of substantial disruption is incorrect. Yet a quick review of the relevant evidence shows that this conclusion is in dispute, at best:

No evidence was presented that the Confederate flag *ever* caused *any* disruption at the school.[5]

APPENDIX H

UNITED STATES DISTRICT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO: 07-5743

[Filed September 25, 2008]

DEREK BARR; CRAIG WHITE and CHRIS WHITE, by and through their parent and guardian, ROGER WHITE,

Plaintiffs/Appellants,

v.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Defendants/Appellees.

[p.1]

APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

I. STATEMENT FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure plaintiff/appellants hereby petition this Court for a rehearing with suggestion for rehearing en banc. Rehearing is requested from this Court's published opinion in the above-entitled case, entered August 20, 2008. See *Barr v. Lafon,* 07-5743 (6th Cir. Aug. 20, 2008).

The grounds supporting this petition include plaintiff-appellants respectful assertion that the panel decision conflicts with the United States Supreme Court's decisions in *Turner Broadcasting v. F.C.C.*, *R.A.V. v. City of St. Paul,*

* * *

[p.3]

III. GROUNDS

A. The Panel's Distinguishing of the Instant Case from *Mosley* is Contrary to Precedent

The panel's opinion distinguished the Supreme Court's *Police Department of City of Chicago v. Mosley* from the instant case by stating:

> "*Mosley* involved adult speech in a public forum, while the instant case involves student speech in a public school, which is a limited public forum. Thus, *Tinker* sets the guiding standard for the instant case while that was not true of *Mosley.*" *Barr,* slip op. at 18, *discussing* 408 U.S. 92 (1972).

The appellants respectfully assert that *Mosley* did, in fact, explicitly follow *Tinker*. *Mosley* is an extension of *Tinker*. *Mosley* explains that, in the context of the school forum, *Tinker* is the substantial government interest element of an equal protection analysis when such an analysis is necessary. When a content-based regulation is at issue *and* if the *Tinker* standard is met, then the next step is to determine whether the content-based regulation is narrowly tailored. The *Tinker* Court never reached this step because in *that* case the *Tinker* standard was *not* met. The *Mosley* opinion, by contrast describes what is done if the initial *Tinker* standard is met *and* a content-based regulation is at issue.

This understanding of the interrelation between *Tinker* and *Mosley* resolves the apparent conflicts that the panel struggles to address in its opinion.[1] See *Barr*, slip op. at 13-15.

* * *

[p.5]

school property, or within the school forum, than the plaintiff in *Morse*. In *both* cases the Supreme Court applied the *Tinker* standard, establishing that both plaintiffs were subject to the limited school forum. 127 S.Ct. 2618; 408 U.S. 92. In both cases the Supreme Court explained that the consideration of the *Tinker* standard was not the end of the analysis, but simply

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[1] Note also that the panel's quote from *Tinker* in support of its assertion that actual viewpoint discrimination is permissible if the *Tinker* standard is applied, does not ***

the first step. The Supreme Court clearly intended its *Mosley* decision to be applied to the school forum.

B. The Panel's Opinion Violates *Mosley* in Light of *Turner Broadcasting v. F.C.C.* and *R.A.V. v. City of St. Paul*

The panel's analysis of appellants' equal protection claim essentially concludes that where a school has met the *Tinker* standard it has, per se, also proven that its regulation is narrowly tailored:

> "The question of whether the dress code's ban on racially divisive symbols is narrowly tailored to that purpose asks us to inquire whether the ban meets the standard set forth in *Tinker*. [Cites to previous *Tinker* analysis within the opinion] We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the school's substantial interest. . ." *Barr,* slip op. at 18.

This conclusion represents a bold dismissal of equal protection precedent as applied to the school setting. This Court appears to be stating that equal protection *cannot* be violated where a school reasonably forecasts disruption.

Alternatively, this may simply be a misunderstanding of the fact that the substantial-government-interest and the narrow-tailoring elements are just that, two distinct, different, and separate elements. As discussed above, *Tinker* simply addresses the substantial government interest element. Where viewpoint

* * *

[p.8]

with actual admissions from the appellees that they are not motivated solely by a desire to prevent disruption, narrow tailoring is even more necessary.[2,3]

The *Mosley* Court not only concluded that narrow tailoring required the defendants to provide *an individualized analysis* of *each prohibited display,* it also concluded that under such circumstances categorical bans, based upon content, should not be allowed at all. *Mosley,* 408 U.S. 92, 100-101.

In the instant case the appellees have admitted that they prohibit *all* displays of the Confederate flag, regardless of likelihood of disruption. JA 101, Dep. LaFon, 23:15-19; 24:5-10; JA 325 Prop. Pre-Trial Or., stip. 9. Therefore the appellants have at least raised a genuine issue regarding the school's failure to narrowly tailor its regulation.

---

[2] Note that the Supreme Court in *R.A.V.* stated that if there is a *possibility* that the defendant school is "seeking to handicap the expression of particular ideas" then the regulation is "presumptively invalid." *R.A.V.*, 505 U.S. at 394.

[3] In the instant case the Confederate flag is being singled out and treated differently than other symbols: the panel notes that "the school alleges that because other symbols have not yet caused a disruption, they have not been explicitly banned." *Barr,* slip op. at 16, citing J.A. at 110 (Hord Dep. At 14:24-15:4). However, the Confederate flag also has not yet caused a disruption, but *has* been explicitly banned.

C. The Panel's Opinion Violates *Tinker*

The standard established by the panel's opinion modifies the *Tinker* standard in a way that substantively weakens the Supreme Court's required showing. This fact is proven by the analysis performed by the panel in the instant case.

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summary judgment for the defendant school. This Court's current standard results in just such a finding. It results in such a finding despite undisputed evidence that "the forbidden conduct" does not in fact cause any disruption. See *Barr,* slip op. at 5; J.A. at 51 (Lafon Aff. ¶4). This turns *Tinker* on its head.[4,5,6]

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[4] On June 27, 2008 the 6th Circuit's Chief Judge Bogs entered a dissenting opinion in another appeal arising from the same underlying case as the instant appeal. See *D.B. v. Lafon*, Amd. Or. Judge Boggs dissent is critical of the standard applied in that appeal, which is very similar to the standard applied in the instant opinion.

[5] The *Tinker* Court stated: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" 393 U.S. at 512.

D. The Panel's Opinion Overturns this Court's Holding in *Castroina v. Madison County School Board*

The panel's *Castorina* decision clearly *holds* "If the students' claims. . .that there were no prior disruptive altercations as a result of Confederate flags are found credible, the court below would be *required* to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker." Castorina v. Madison County Sch. Bd.,* 246 F3d. 536 (2001). The panel's opinion discards that holding.

As the panel's opinion points out, however, such an overruling of this Court's precedent *requires* an en banc decision. *Barr,* slip op. at 14, citing *Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985).

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E. The Panel Mis-Applied *U.S. v. Khalil* and Did Not Perform a De Novo Review

The panel's opinion explains that the appellants waived certain admissibility issues because they were not specific enough in raising objections to admissibility. *Barr,* slip op. at 9. However, this statement fundamentally misconstrues the procedural status of this case, the burdens at issue, and this Court's role in performing a de novo review.

The appellants, being the non-moving party, have no burden to prove that evidence relied upon by the moving party is inadmissible. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (986). To the contrary, at

this procedural stage the movant has the entire burden to prove that they can conclusively prove their case, via admissible evidence. *Id.* This is particularly true where the movant has the full burden of proof in the case, such as the school-defendants in the case at bar. See *Tinker*, 393 U.S. 503.

The appellants' suggestion that much of the movants' evidence is clearly inadmissible was simply intended to alert this Court to an evidentiary issue of particular importance. However, regardless of the presence or absence of the appellants' assertion, it is this *Court's* duty to consider *all* evidentiary issues, while performing its *de novo* review of the movants' evidence. *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485, 499 (1984). A review of this Court's opinion reveals

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